

UNITED STATES OF AMERICA  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KATHIE COSTANICH,

Plaintiffs,

v.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES FOR THE STATE OF  
WASHINGTON, et al.,

Defendants.

Case No. C05-0090MJP

PROTECTIVE ORDER

This matter comes before the Court on Plaintiff's motion for a protective order. (Dkt. No. 75.) Plaintiff requests that the Court prevent Defendant Department of Social and Health Services (DSHS) from deposing her two minor daughters. Defendants oppose the motion. (Dkt. No. 81.) Having considered the motion and response, Plaintiff's reply (Dkt. No. 83), Defendants' surreply (Dkt. No. 85), all documents submitted in support thereof and the record herein, the Court GRANTS the protective order.

**Background**

This case arises from the State of Washington Department of Social and Health Services' ("DSHS") decision to revoke Plaintiff's foster care licence after making a finding that Plaintiff had emotionally abused her foster children. Plaintiff challenged the decision administratively and in state court, and also filed this action (in state court) alleging intentional infliction of emotional distress, negligent infliction of emotional distress, negligent investigation and improper removal of the foster children, and violations of Plaintiff's civil rights. Defendants removed this action to this Court and on January 27, 2006, the Court granted Defendants' motion to stay the proceedings

1 while the Washington Court of Appeals considered DSHS's appeal of the underlying case. After  
2 the parties informed the Court that the court of appeals had issued its decision in favor of Plaintiff,  
3 and that DSHS would not appeal that decision, the Court, on March 6, 2007, lifted the stay and  
4 issued a case scheduling order. With leave of Court, Plaintiff twice amended her complaint, first  
5 to add abuse of process and malicious prosecution claims, and second to request attorneys fees.  
6 (Dkt. Nos. 65, 84.) Trial is scheduled for February 4, 2008, and discovery closed on October 9,  
7 2007. (Dkt. No. 53.)

8 On September 25, 2007, Defendants sent Plaintiff's counsel a letter informing Plaintiff of  
9 Defendants' intention to depose E.N. and B.N., Plaintiff's foster children and the subject of the  
10 abuse allegations in the underlying state court lawsuit. On October 2, Defendants sent a  
11 videotape deposition subpoena to E.N. and B.N.<sup>1</sup> (See Dkt. No. 81-2, Lux Decl., Exs. A & B.)  
12 In an October 1 teleconference, Plaintiff's counsel informed Defendants that she would not  
13 produce the girls for deposition. (Lux Decl. ¶ 4.) On October 4, Plaintiff filed the instant motion  
14 for protective order. (Dkt. No. 75.) As far as the Court is aware, E.N. and B.N. have not been  
15 deposed. Plaintiff requests that the Court issue a protective order preventing Defendants from  
16 deposing E.N. and B.N., moves to strike the declarations attached to Defendants' response, and  
17 requests terms.

## 18 Discussion

### 19 A. Motion to Strike

20 In her response, Plaintiff moves to strike the declarations of Wendy Lux and Halei Young,  
21 which were attached to Defendants' response. Plaintiff has offered no support for this request,  
22 except for a statement that the exhibits are "lengthy," include "new allegations" and "more  
23 hearsay." The Court will not strike entire declarations and exhibits based on these generalized  
24 allegations. The motion to strike is DENIED.

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26 <sup>1</sup> The day prior, Defendants erroneously sent E.N. and B.N. notices of a perpetuation  
27 deposition. (Lux Decl., Exs. A & B; Def's Resp. at 5.)

**B. A Protective Order is Warranted**

Federal Rule of Civil Procedure 26(c) authorizes the Court to “make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” including that discovery not be had or that the disclosure or discovery may be had only on specified terms and conditions. Plaintiff argues that deposing E.N. and B.N. would be oppressive and that the burden imposed by the depositions outweighs any beneficial information to be gained. Defendants argue that the girls’ testimony is relevant to their defense in this suit.

The Court concludes that a protective order should issue. Plaintiffs’ claims are rooted in Defendants’ prosecution of a case of child abuse against Plaintiff; they do not investigate the legitimacy of E.N. and B.N.’s complaints or allegations against Plaintiff. Moreover, the parties have already developed an administrative and state court record in the underlying action. See Costanich v. DSHS, 138 Wn.App. 547 (2007). Plaintiff explains, and Defendants do not dispute, that the administrative record includes testimony from the Plaintiff, her husband, all of the children’s doctors, therapists, counselors, and aides, various DSHS employees, foster parents, foster parent liaisons, and two experts on fetal alcohol syndrome. (Plf’s Mot. at 6.) Given the already-developed record and the nature of Plaintiff’s claims here, it is unnecessary to subject these two children to potentially traumatizing questioning about their relationship with their foster parent, including questions about allegations of abuse, in the context of this action.

Defendants argue that they should be able to depose the girls based on E.N.’s recent allegation of abuse against Plaintiff Costanich. On July 9, 2007, the Kalispell tribe, of which E.N. is a member, made a referral to DSHS based on E.N.’s recent allegation that Ms. Costanich hit her, pulled her hair, threatened her, and threatened her pets. (Young Decl. ¶ 2.) The Court has already ruled that Defendants may not seek discovery regarding any current investigation into the Costanich household. (See Minute Order, Dkt. No. 80.) Defendants argue, however, that current allegations of abuse, if valid, “would make the Defendants’ position that they were justified in

1 their original finding of emotional abuse more probable.” (Def’s Resp. at 7.) The Court disagrees.  
 2 Current allegations are not relevant to the specific claims here, which relate to DSHS’s 2001  
 3 investigation and subsequent prosecution of emotional abuse in the Costanich home. (See Second  
 4 Amended Compl., Dkt. No. 84.) And even if the current allegations are valid, they do not make  
 5 true or even support prior allegations. The two sets of allegations and investigations are  
 6 completely unrelated.

7 Therefore, because a record has already been developed, because Plaintiffs’ claims focus  
 8 on DSHS’s investigation and prosecution rather than the legitimacy of the girls’ allegations in the  
 9 underlying matter, and because new allegations of abuse are irrelevant, the Court concludes that  
 10 depositions of E.N. and B.N. would be duplicative and oppressive. The motion for protective  
 11 order is therefore GRANTED. Defendants may not depose E.N. or B.N.<sup>2</sup>

#### 12 **C. Terms are Not Warranted**

13 Plaintiff requests terms for having to respond to Defendant’s “oppressive 134 page  
 14 response,” which included DSHS’s new and old allegations. But Defendants’ response brief fell  
 15 within the page limitation imposed by local rule, see Local Civil Rule 7(e), and the local rules set  
 16 no limit on the number of pages that may be submitted as exhibits. In addition, Plaintiff fails to  
 17 provide legal support for her fee request. The request for terms is DENIED.

#### 18 **Conclusion**

19 The motion for protective order is GRANTED. Defendants may not depose E.N. or B.N.

20 The clerk is directed to send copies of this order to all counsel of record.

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22 Marsha J. Pechman  
 23 United States District Judge

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 25 <sup>2</sup> Because the Court concludes that the depositions should be prohibited, the Court need  
 26 not consider Plaintiff’s additional arguments that (1) the deposition notices were insufficient, (2) that  
 27 E.N. and B.N. are not competent to testify, and (3) that collateral estoppel bars re-litigation of the  
 state court case.